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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

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No. 185

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE
STATE OF NEW YORK,

Petitioner,

vs.

WESTERN PERISHABLE CARLOAD RECEIVERS
ASSOCIATION OF NEW YORK, INC.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, AND BRIEF IN SUPPORT
THEREOF.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 185

IN THE MATTER OF THE CLAIM FOR BENEFITS UNDER ARTICLE
18 OF THE LABOR LAW OF THE STATE OF NEW YORK, MADE
BY SYLVIA PERRY,

Claimant-Petitioner.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE
STATE OF NEW YORK,

Petitioner,
against

WESTERN PERISHABLE CARLOAD RECEIVERS
ASSOCIATION OF NEW YORK, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The above-named Frieda S. Miller, as Industrial Commissioner of the State of New York, and Sylvia Perry, claimant, petitioners herein, pray for a writ of certiorari to review the order, decision and judgment of the Court of Appeals of the State of New York, being the court of

last resort of that State, reversing a final order of the Supreme Court of the State of New York, Appellate Division, Third Department, and annulling the decision of the Unemployment Insurance Appeal Board of the State of New York (record—remittitur of Court of Appeals of New York). The order and judgment of the Court of Appeals were made the order and judgment of the Supreme Court of the State of New York, Appellate Division, Third Department, by the filing of the remittitur of said court with the Clerk of the Supreme Court, Appellate Division, Third Department, on the 27th day of March, 1942, and the entry of the judgment and order of the Supreme Court, Appellate Division, Third Department, on the same date. Copies of the orders and judgments are included with the record at pp. 39-51.

The opinion of the Court of Appeals sought to be reviewed was handed down on March 5, 1942, and appears in the record, pages 46-49. The remittitur was issued to the Supreme Court, Appellate Division, Third Department, March 6, 1942. By the judgment and remittitur, the Court of Appeals reversed the order of the Supreme Court, Appellate Division, Third Department, and annulled the decision of the Unemployment Insurance Appeal Board, basing its decision on the determination that under the terms of the Perishable Agricultural Commodities Act of 1930 (U. S. C. A., Title 7, Ch. 30-A) and the agreement made in this case between the respondent and the United States Department of Agriculture, one Sylvia Perry was employed not by the respondent but by the said Department of Agriculture and, as such, an employee of the Federal Government and, therefore, not eligible for unemployment insurance benefits within the purview of Article 18 of the Labor Law of the State of New York on the grounds that she had not worked during the calendar year 1938 for an employer subject to the provisions of the New York Unemployment Insurance Law.

The determination was necessarily based on the construction and interpretation of the Federal statute, namely, the Perishable Agricultural Commodities Act of 1930.

Summary Statement of the Matter Involved.

The respondent is a membership corporation organized under the laws of the State of New York, and its members are dealers in fruits and vegetables (R. 16). This merchandise is purchased by the various members of the respondent in carload lots from shippers in different states of the Union (R. 16-17). Because of the perishable nature of the merchandise, it frequently arrives at its destination, namely, the City of New York, in a damaged condition (R. 20).

In order to provide for an impartial inspection of the condition of the merchandise upon its arrival in the city, and the condition of the cars in which the merchandise was shipped, the respondent, on August 1, 1933, entered into an agreement with the Bureau of Agricultural Economics of the United States Department of Agriculture (Employer's Exhibit "B" received in evidence, R. 19, 22, and appearing R. 33-36), whereby that bureau agreed as follows:

It will select, train, license and supervise inspectors whose duties shall be to inspect the merchandise shipped to all the members of the association. The inspection is to be made in the car wherever practicable in order to determine before the car is unloaded the nature, extent and location of any damage which may be evident and to note any material defects in the car or equipment. The bureau will then furnish to the association or the individual member who is the receiver of the car in question, an original and two carbon copies of a certificate describing the condition of the merchandise and of the car or equipment. This service is to be rendered to the association and its members only and shall not be available to any other parties.

The association and its individual members agree that all merchandise received in carloads shall be inspected by the

inspectors of the bureau to be appointed by the supervising inspector for that purpose. The inspectors to be appointed for this purpose together with the necessary clerks and other personnel shall be paid by the association from a fund to be established for that purpose. The members of the association will pay \$2.00 per car for every inspection, plus an amount sufficient to cover the general overhead of the bureau.

In order to guarantee the initial salaries of the inspectors, clerks and supervisors engaged in the work, the association provided a working fund of \$3,000, which was deposited in a special fund created for that purpose. The association agreed that the supervising inspector of the bureau shall have the sole right to appoint inspectors, clerks and other members of the personnel. The association further promised not to interfere with the work of the inspectors and to file all complaints with respect to the inspection with the supervising inspector of the bureau. The object of the last two provisions is to guarantee the impartiality of the inspection (R. 17, 33-36).

In accordance with the provisions of this contract, the supervising inspector of the Bureau of Agricultural Economics appointed inspectors, clerks and other personnel. The bureau billed individual members for the services rendered to them. Checks and other remittances when received were turned over by the bureau to the treasurer of the respondent who deposited same in the special fund. The supervising inspector prepared a payroll every two weeks, which was sent to the treasurer of the respondent who issued checks therefor to the respective members of the personnel. When the special fund exceeded \$3,000 the excess was refunded by the respondent pro rata among its members (R. 17-18, 23, 26-27, 33).

The respondent maintained a workmen's compensation policy for the benefit of the inspectors rendering services

in inspecting the merchandise shipped to its members (R. 24, 30). This inspection is not required by any law of the United States, or by any rule of the Department of Agriculture (R. 17, 20). *The service is rendered by the bureau for the private benefit and advantage of the respondent and its members* (R. 29, 34).

There were at least four persons employed either as inspectors or as clerks in rendering services to the respondent herein for thirteen weeks during the year 1935 (R. 15). Sylvia Perry was employed as a clerk in rendering services to the respondent (R. 14). Following the termination of her employment (R. 14) she applied for unemployment insurance benefits from the State of New York, based on her earnings in 1938. Her period of employment and the amount of her earnings are not in dispute. She received \$25.00 per week every week during 1938 from the respondent (R. 33, 37).

All the expenses of the inspection services are borne by the respondent (R. 33). When Sylvia Perry was hired she was not selected from any governmental list or civil service list (R. 25). The clerical force is hired either from personal knowledge or from recommendations of individuals or from agencies such as typewriter employment agencies. No civil service requirements are invoked (R. 25). No pension deduction is made from their salaries and they are not required to belong to any retirement fund (R. 25).

Sylvia Perry was recommended by a *civil service employee in the bureau* and hired after she was given a typing test (R. 28). Employees of members of the respondent have recommended the hiring of certain individuals (R. 28).

There is no proof in this record that the inspectors could hire the clerical services of Sylvia Perry on behalf of the United States.

An Unemployment Insurance Referee, after holding hearings on the claim for unemployment insurance benefits

filed by Sylvia Perry, made his decision that Sylvia Perry was an employee of the United States Department of Agriculture, and as such employee, did not work in employment subject to the Unemployment Insurance Law of the State of New York (R. 11).

The Unemployment Insurance Appeal Board of the State of New York reversed the referee's decision and held that the respondent, and not the Department of Agriculture, was the employer of Sylvia Perry, and that Sylvia Perry was entitled to be credited with her earnings with the respondent, who was subject to the Unemployment Insurance Law (R. 6). The respondent thereafter appealed from the decision of the Board to the Supreme Court, Appellate Division, Third Department. The Appellate Division, in a four to one decision, affirmed the decision of the Unemployment Insurance Appeal Board. The opinion for affirmance was written by Hill, P. J. Mr. Justice Crapser dissented and voted to reverse the decision of the Board and to reinstate the decision of the referee. The decision of the Appellate Division and the opinion for affirmance are found at folios 190-202. The respondent thereupon appealed to the Court of Appeals which unanimously reversed the said order of the Appellate Division with an opinion written by Lehman, Ch. J., reported in 287 N. Y. 539, at pp. 541-544. The opinion written in the Court of Appeals by Chief Judge Lehman, and the opinion written in the Supreme Court, Appellate Division, Third Department, by Presiding Justice Hill are in the record at pages 46 and 41. The opinion of Chief Judge Lehman, concurred in by the other Judges of the Court of Appeals, is based upon the ground that Sylvia Perry was not an employee of the respondent but was an employee of the Federal Government by reason of the provisions of the Perishable Agricultural Commodities Act of 1930 and the memorandum agreement entered into be-

tween the respondent and the Bureau of Agricultural Economics of the Department of Agriculture.

Question Presented.

A substantial Federal question is involved, namely, whether Sylvia Perry was an employee of the Federal Government or an employee of the respondent. If she was an employee of the former, then she is not entitled to unemployment insurance benefits of the State of New York, and the State of New York may not collect an unemployment insurance tax upon her earnings. If she is an employee of the respondent, then she is entitled to unemployment insurance benefits, and the State of New York may collect unemployment insurance taxes from the respondent.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237 of the Judicial Code of the United States (28 U. S. C. A. § 344, subd. b), to correct error of the Court of Appeals of the State of New York, the Court of last resort in that State.

The Reasons Relied Upon for Allowance of the Writ.

It is respectfully submitted by your petitioners and relied upon as reasons for granting of the writ that:

(A) The Court of Appeals of the State of New York has construed a Federal statute, viz., Perishable Agricultural Commodities Act of 1930 (U. S. C. A. Title 7, Ch. 30-A), and a memorandum of agreement entered into as provided for in that Act, to mean that the necessary clerks employed in the office of the Bureau of Agricultural Economics, Department of Agriculture, engaged in providing inspection service rendered to the respondent, are employees of the United States Government, thus and thereby relieving the respondent from payment of the unemploy-

ment insurance tax to the State of New York upon the remuneration paid by it to such clerks, and depriving such clerks, including claimant-petitioner herein, from the benefits of the Unemployment Insurance Law of the State of New York.

(B) That the decision of the Court of Appeals of the State of New York is one of first impression involving the construction and application of recently enacted Federal legislation of direct concern to the administration of the Unemployment Insurance Law, not only in the State of New York but in all other jurisdictions which have Unemployment Insurance Laws.

(C) That the Court of Appeals of the State of New York has decided the question interpreting a Federal statute which differs from rulings by the United States Department of Agriculture made on or about November 21, 1941 and by the Bureau of Internal Revenue, made December 18, 1941, to the effect that inspectors (other than a supervising inspector), typists and other personnel employed under the inspection agreement herewith concerned, and the respondent herein are subject to the taxes imposed by Titles VIII and IX of the Social Security Act and sub-chapters A and C of Chapter 9 of the Internal Revenue Code and amendments thereto.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, Appellate Division, Third Department, and to the Court of Appeals of the State of New York, commanding the said courts to certify and to send to this Court for its review and determination as provided by law, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case,

entitled "In the Matter of the Claim for Benefits under Article 18 of the Labor Law, made by Sylvia Perry, Claimant, Western Perishable Carload Receivers Ass'n of New York, Inc., Employer-Appellant, Frieda S. Miller, as Industrial Commissioner, Respondent," and that the said order and judgment of the Court of Appeals of the State of New York may be reversed by this Honorable Court, as prayed for by Petitioners, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just. A certified copy of the record in the courts below is submitted herewith in support of this petition.

June 22, 1942.

Respectfully submitted,

SYLVIA PERRY,

Claimant-Petitioner.

FRIEDA S. MILLER,

*Industrial Commissioner of the State
of New York, Petitioner.*

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